

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

In the matter of XO Illinois, Inc.	)	
Petition for Arbitration pursuant to	)	
Section 252 (b) of the Telecommunications	)	Docket No. 01-0466
Act of 1996 to establish an Interconnection	)	
Agreement with Illinois Bell Telephone	)	
Company d/b/a Ameritech Illinois	)	
	)	

**INITIAL BRIEF OF XO ILLINOIS, INC.**

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## **I. STATEMENT OF THE CASE AND SUMMARY OF XO'S POSITION.**

This proceeding was initiated by XO Illinois, Inc. ("XO") for arbitration of terms, conditions, and prices for interconnection with Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech"). The Commission's jurisdiction to hear this case is set forth in Section 252 (b) of the federal Telecommunications Act of 1996 ("Federal Act"), 47 U.S.C. § 252 (b).

On May 30, 2001, XO exercised its rights under Section 252(i) of the Federal Act to opt into the interconnection agreement between Ameritech and Focal Illinois ("Focal Agreement"). Through that request and subsequent communications with Ameritech, XO asked Ameritech to enter into an interconnection agreement that provides the parties with the same reciprocal compensation rate and structure that is contained in the Focal Agreement. Specifically, XO has exercised its rights under Section 252(i) of the Federal Act (43 U.S.C. 252(i)) to opt into the Interconnection Agreement between Ameritech Illinois and Focal for Section 251(b)(5) traffic and, consistent with the FCC ISP Order, has requested that the parties use the Commission approved TELRIC based rates for traffic terminated with Internet Service Providers ("ISPs"). The Commission-approved TELRIC based rates for 251(b)(5) tariff are contained in the Focal Agreement and are reflected in Ameritech's Commission-approved tariffs.

Ameritech has argued that the Federal Communications Commission's ("FCC's") *Order on Remand Report and Order*, FCC Order 01-131 (April 27, 2001) (the "FCC Order" or "ISP Order") allows it to renegotiate not only compensation for ISP-bound traffic but all reciprocal compensation provisions in the Focal Agreement. Ameritech is proposing a completely new method of measuring and calculating reciprocal compensation that is based on adjustments to its cost studies - adjustments which have

never been considered by this Commission. Moreover, Ameritech wants this new rate structure to apply to all traffic, both ISP bound traffic and Section 251(b)(5) traffic.

There are two basic issues before the Commission in this arbitration proceeding. First, may XO use Section 252(i) of the Act to opt into the reciprocal compensation provisions, both structure and rate, of the Focal Agreement for Section 251(b)(5) traffic? As shown in Section III of this brief, XO's right to opt into the Focal Agreement structure and rate for Section 251(b)(5) traffic is absolute. Second, should the parties compensate each other for ISP traffic at the Commission approved TELRIC-based rates? As shown in Section IV of this brief, the legal, and logical rate to be used for ISP traffic is the Commission-approved TELRIC-based rate. Once the Commission answers these two questions, it must then determine what contract language is necessary to implement the Commission's findings. As discussed in Section V of this brief, XO is willing to make certain modifications to the Focal Agreement to address the issues Ameritech raised regarding the need for specificity in the agreement for the treatment of ISP traffic.

## **II. LEGAL STANDARD**

This arbitration must be resolved under the standards established in Sections 251 and 252 of the Act, 47 USC §§ 251, 252, the rules adopted and orders issued by the FCC in implementing the Act, and the applicable rules and orders of this Commission. Section 252(c) of the Act requires a state commission resolving open issues through arbitration to:

- (1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d) [of Section 252].

The Commission may also, under its own state law authority, impose additional requirements pursuant to Section 252(e)(3) of the Act, as long as such requirements are consistent with the Act and the FCC's regulations. 47 USC 252(e)(3). The Commission should make an affirmative finding that the rates, terms, and conditions that it prescribes in this arbitration proceeding are consistent with the requirements of Sections 251(b) and (c) and 252(d) of the Act, 47 USC §§ 251(b) and (c) and 47 USC § 252(d).

Because the resolution of the issues in this case is inextricably linked to XO's request under Section 252(i) of the Federal Act to opt into the Focal Agreement, this arbitration proceeding must resolve the scope of XO's rights set forth in that section of the Act, which provides:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 USC 252(i)

### **III. XO HAS THE RIGHT TO OPT INTO THE FOCAL AGREEMENT PROVISIONS FOR RECIPROCAL COMPENSATION FOR SECTION 251(B)(5) TRAFFIC.**

The first issue to be resolved is whether XO has the right to opt into the reciprocal compensation provisions in the Focal Agreement for Section 251(b)(5) traffic. The resolution of this issue should be simple. XO has an absolute right to opt-in to the Focal Agreement. Nothing in the Federal Telecommunications Act, the FCC Order, the Focal

Agreement or Illinois law allows Ameritech to sidestep XO's 252(i) request to opt into the Focal structure and rate for 251(b)(5) traffic. XO's absolute right under Section 252(i) moots all of Ameritech's arguments regarding the alleged economic inefficiencies with the current reciprocal compensation scheme.

**A. Ameritech Cannot Rely On the FCC's "Legitimately Related" Limitation.**

Ameritech's first reason for refusing XO its statutory rights is that the reciprocal compensation provisions for 251(b)(5) traffic in the Focal Agreement are "legitimately related" to the issue of compensation for ISP traffic. According to Ameritech, because the FCC Order prohibits carriers from opting into the reciprocal compensation provisions of an existing agreement for ISP traffic, carriers are also prohibited from opting into "legitimately related" provisions, such as compensation for Section 251(b)(5) traffic. Ameritech Answer at 6-7.

However, Section 251(b)(5) traffic is not "legitimately related" to ISP traffic. In the ISP Order, the FCC found that calls that terminate with ISPs are among the type of calls identified in Section 251(g) of the Act and that such traffic is excluded from "telecommunications" traffic which is subject to reciprocal compensation in Section 251(b)(5). The FCC concluded that since traffic delivered to an ISP is jurisdictionally mixed and cannot be reliably separated it is properly classified as interstate traffic and is subject to Section 201 of the Act. The FCC has thus distinguished between "telecommunications traffic" subject to reciprocal compensation ("251(b)(5) traffic") and ISP-bound traffic subject to its Section 201 authority.

Having made this distinction between 251(b)(5) traffic and ISP-bound traffic, the FCC in its Order then fashioned a plan to address the perceived problems in the current compensation scheme for ISP-bound traffic. The FCC has not disturbed the current state-approved reciprocal compensation plans for 251(b)(5) traffic.

Exercising its authority under Section 201, the FCC established an interim compensation regime for the exchange of ISP-bound traffic. The stated goal of this interim compensation regime is “to address the market distortions under the current intercarrier compensation regimes for ISP-bound traffic.” FCC Order, para. 77. While “avoid[ing] a ‘flash cut’ to a new compensation regime that would upset the legitimate business expectation of carriers and their customers.” *Id.*

Participation by the ILEC in this interim regime is voluntary. However, if an ILEC chooses not to participate in the interim regime, the FCC Order mandates that ILECs exchange ISP-bound traffic at the state-approved reciprocal compensation rates. *Id.* at para. 89. This mandate however does not disturb the current state-approved reciprocal compensation scheme, it is merely a mechanism implemented by the FCC to rein in the superior bargaining power of the ILECs. *Id.*

A review of the FCC’s ISP Order shows that it had no intention to override carriers’ right to opt into existing interconnection agreements’ provisions for the compensation of Section 251(b)(5) traffic. The key provisions are as follows:

. . .carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to **the rates paid for the exchange of ISP-bound traffic.**

FCC Order, para 89. (footnotes omitted, emphasis added)

\*\*\*\*

We find there is good cause under 5 U.S.C. § 553(d)(3), however, to prohibit carriers from invoking section 252(i) with respect to **rates paid for the exchange of ISP-bound traffic** upon publication of this Order in the Federal Register . .

FCC Order, footnote 154 (emphasis added)

\*\*\*\*

We conclude that any “reasonable period of time” for making available **rates applicable to the exchange of ISP-bound traffic** expires upon the Commission’s adoption in this Order of an intercarrier compensation mechanism for ISP-bound traffic.

FCC Order, footnote 155 (emphasis added)

The FCC could not have been more clear. It was only interested in preventing carriers from exercising their Section 252(i) rights “with respect to the rates paid for the exchange of ISP-bound traffic,” which the FCC had determined is within its Section 201 jurisdiction. There is nothing in the FCC Order that indicates that the FCC intended to allow ILECs to deny CLECs the ability to opt into the provisions in existing interconnection agreements for Section 251(b)(5) traffic under the guise of the “legitimately related” limitation in the First Report and Order.

Further, an examination of the FCC’s use of the term “legitimately related” shows that Ameritech is ignoring both the letter and the spirit of that term.<sup>1</sup> The FCC recognized that, in order to prevent discrimination in the “pick and choose” scenario, an incumbent LEC could require a requesting carrier to accept all terms that the incumbent LEC can prove are “legitimately related” to the desired term. *First Report & Order*, FCC 96-325, released Aug. 8, 1996, para. 1315. Thus, where a CLEC is picking and choosing

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<sup>1</sup> XO refers to the “legitimately related” language as a “limitation” because the FCC did not include that language in its rules that were approved in the First Report and Order or in any subsequent revisions to its rules published in the Federal Register.

certain individual terms or conditions from an existing interconnection agreement, an ILEC may require a CLEC to opt into additional existing terms in that same interconnection agreement in order to ensure that all related items in the give and take of negotiations were included. The burden of proof, however, is on the ILEC to prove such additional terms are “legitimately related”. FCC First Report and Order, para. 1315.

However, Ameritech has turned the FCC’s First Report and Order on its head. First, XO is not asking to “pick and choose” individual terms and conditions of an existing interconnection agreement. XO is requesting the entire Focal Agreement, with the exception of the rates for ISP-bound traffic pursuant to the FCC ISP Order. Although the FCC ISP Order prohibits opt in with regard to the rates paid for ISP-bound traffic, the Order does not open the issue up for renegotiation. The Order dictates that if the ILEC elects the interim compensation regime, ISP-bound traffic will be exchanged at the rates set in the Order. If the ILEC does not elect the interim compensation regime, ISP-bound traffic shall be exchanged at the state-approved or state-arbitrated reciprocal compensation rate. The Order does not disturb current compensation schemes for 251(b)(5) traffic.

Further, the First Report and Order requires only that CLECs accept additional existing provisions, it does not provide a means by which Ameritech can delete existing provisions and force CLECs to accept new provisions. In other words, according to Ameritech, if a court or regulatory agency finds that a carrier need not include a provision in its agreements, then that court or agency has simultaneously “poisoned” any term or condition “legitimately related” to the newly non-obligatory term, requiring renegotiation of all of these supposedly related provisions. Ameritech does not provide any support for

its novel interpretation of the FCC’s “legitimately related” limitation as a mechanism to eliminate terms available under an agreement.

**B. Ameritech Improperly Relies Upon the FCC’s “Reasonable Period of Time” Limitation.**

Ameritech’s second argument for refusing to allow XO to opt into the Focal rate for Section 251(b)(5) traffic was provided by Mr. Panfil. He testified that the source of Ameritech’s refusal to allow XO to opt into the rate for Section 251(b)(5) traffic is predicated on a narrow passage in footnote 155 of the FCC Order. T. 132. A review of that footnote, however, shows that the FCC did not eliminate carriers’ rights to opt into the reciprocal compensation provisions for Section 251(b)(5) traffic. As with every other reference to 252(i) in its Order, the FCC explicitly limited its restriction to the rates applicable to ISP traffic:

... We conclude that any “reasonable period of time” for making available **rates applicable to the exchange of ISP-bound traffic** expires upon the Commission’s adoption in this Order of an intercarrier compensation mechanism for ISP-bound traffic.

FCC ISP Order, Footnote 155 (emphasis added).

If the FCC intended to take the monumental step of eliminating CLECs’ rights to opt into the reciprocal compensation provisions of existing agreements for Section 251(b)(5) traffic, it would have clearly said so. Instead, it explicitly limited its ruling of “reasonable period of time” to the rates applicable to ISP bound traffic.

**C. The Focal Agreement Does Not Open the Door to Renegotiation of Reciprocal Compensation for Section 251(b)(5) Traffic.**

Staff witness Dr. James Zolnierrek indicated that the terms of the Focal Agreement require XO to accept whatever rate the Commission decides in this proceeding is appropriate for Section 251(b)(5) traffic. Thus, according to Dr. Zolnierrek, the Commission could determine that XO must accept Ameritech's bifurcated proposal for Section 251(b)(5) traffic instead of the rate in the Focal Agreement. The basis for Dr. Zolnierrek's opinion is a footnote to the pricing schedule in the Focal Agreement. That footnote provides as follows:

Certain of the rates, charges and prices contained in this Pricing Schedule have been established by the Commission pursuant to the procedures mandated in its February 17, 1998 order, issued in Docket No. 96-0486, 96- 0559, consolidated, as amended by its Amendatory Order dated April 6, 1998 (the "TELRIC Order"). Notwithstanding anything to the contrary in this Agreement, including Section 28.2, if the Commission, a court or other tribunal of competent jurisdiction issues an order in a subsequent proceeding that establishes, changes or results in rates, charges or prices **that generally apply to the products and services available in this Agreement** (a "Subsequent Order"), the Parties agree to substitute the TELRIC Order rates with such new or modified rates, charges or prices established in the Subsequent Order and such rates, charges and prices shall be effective in accordance with the Subsequent Order.

Focal Agreement, Exhibit PS-1, Footnote 1 (emphasis added)

Dr. Zolnierrek has misinterpreted the meaning of the Focal Agreement. The footnote he refers to is the change of law provision found in many agreements that allows carriers to modify rates in response to court or Commission ordered modifications to "charges or prices that generally apply to the products and services available in this Agreement." The footnote is clearly addressing changes in rates for all carriers that would result from appeals or rehearings of the TELRIC Order. To read this footnote any

other way would allow Ameritech to use it as an excuse to unilaterally deny carriers the ability to opt into rates in an existing agreement.

**D. The FCC's ISP Order Does Not Affect Rates for Section 251(b)(5) Traffic.**

The FCC describes the scope of its decision in the first paragraph of the order.

“In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs).” FCC Order, para. 1. Throughout the remainder of the Order, the FCC says nothing to qualify this definitive statement. No matter how much Ameritech may want to squeeze some uncertainty out of the FCC Order, it may not ignore the fact that the FCC explicitly stated that its purpose was to only affect rates relating to ISP traffic.

Ameritech's own witness provided an equally clear statement regarding the focus of the FCC order on ISP traffic. Ameritech had objected to the proposal by Staff that this Commission order Ameritech to immediately choose whether it will adopt the FCC interim compensation regime. One of Ameritech's excuses for not opting into the interim compensation regime was that it believes some carriers would arbitrage the reciprocal compensation system by accepting price caps on ISP traffic, but not on Section 251(b)(5) traffic. Ameritech Ex. 3, pp. 5-6. As can be seen from the following dialogue between Mr. Panfil and counsel for Ameritech, he agrees with XO that the FCC Order only affects ISP rates, not Section 251(b)(5) rates:

Q. Why then - - if the contract does include such a change of law provision, that is, a provision that would allow Ameritech to compel this hypothetical carrier to exchange ISP-bound traffic at the FCC capped rates [sic], why couldn't Ameritech Illinois invoke that same

change of law provision to invoke that same carrier to exchange 251(b)(5) rates at those FCC capped rates?

- A. My understanding would be that we could not do that because the FCC order did not change the law or change the rules for 251(b)(5) traffic. It only changed the law or the rules for ISP-bound traffic.

T. 141-42.

XO could not have stated it any more clearly. Ameritech's excuses for refusing XO's opt-in request are directly contradicted by the crystal clear statement of Mr. Panfil. "The FCC order did not change the law or rules for Section 251(b)(5) traffic. It only changed the law or rules for ISP bound traffic." XO therefore, must be allowed to exercise its Section 252(i) right to opt into the reciprocal compensation rate in the Focal Agreement for Section 251(b)(5) traffic.

#### **IV. XO IS ENTITLED TO COMPENSATION FOR ISP TRAFFIC AT THE COMMISSION APPROVED TELRIC BASED RECIPROCAL COMPENSATION RATE.**

As shown above, there should be no question that XO is entitled to opt into the Focal rate for Section 251(b)(5) traffic. The only legitimate issue in this case is the rate that should be paid for traffic that terminates with ISPs. As set forth in paragraph 89 of the FCC Order, XO may not opt into the rate in the Focal Agreement for traffic terminated with ISPs. Instead, it must accept the "state-approved or state-arbitrated" rate:

For those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This "mirroring" rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic. (emphasis in original)

FCC Order, para. 89.

As a result of the FCC Order, this Commission must decide what “state approved rate” should be applied to ISP traffic. As shown below, the only legal and logical choice is the Commission-approved TELRIC based rate proposed by XO.

**A. The Commission Should Adopt XO’s Proposal to Use the Commission Approved TELRIC Based Rates for ISP Compensation.**

The reciprocal compensation rates contained in the Focal Agreement are the same rates approved by this Commission in Docket No. 96-0486, 96-0559 (Second Interim Order, February 17, 1998). Thus, these rates meet the FCC requirement that they be “state-approved or state-arbitrated reciprocal compensation rates.” FCC Order para. 89. Whether one wishes to refer to them as the Focal rates or the TELRIC rates, they are the rates that should be used by the parties to compensate each other for the termination of ISP traffic.

**1. XO May Opt Into the Rate Design in the Focal Agreement for Compensation for ISP Traffic.**

The FCC Order limits XO’s rights to opt-in to the Focal Agreement in only one respect – the rate that applies to ISP-bound traffic – and nothing more. The Order, at paragraph 82, makes this clear:

...as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. (footnote omitted; emphasis added)

Similarly, at footnote 149, the FCC states that the effect of the Order is limited to rates for ISP-bound traffic:

This interim regime affects only intercarrier compensation (i.e., the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection. (Emphasis in original)

Thus, XO cannot opt into the Focal rate. However, XO is entitled to opt into the Focal rate design which consists of a single charge for each minute of use for both tandem and end office switching ("unified rate design"). By pursuing its new bifurcated rate design, however, Ameritech has violated XO's Section 252(i) right to opt into the Focal rate design for the termination of ISP traffic.

**2. The Commission Approved TELRIC Based Rate Established in Docket No. 96-0486, 96-0559 Meets the Requirements of the FCC Order.**

Even if the Commission accepts Ameritech's argument that XO does not have an absolute right to opt into the Focal rate design for the termination of ISP traffic, the Commission should direct the parties to use the unified rate design because it is the most appropriate rate design. The FCC considered proposals to change the intercarrier compensation structure, including a bifurcated rate design, but declined to do so. (FCC Order, footnote 142.) Instead, it adopted price caps based on a unified rate design - the type of rate design contained in the Focal Agreement. Allowing XO to opt into that rate design at the Commission-approved TELRIC based rate would thus be entirely consistent with the FCC Order.

**3. The Parties Should Compensate Each Other for Terminating ISP Traffic at the Same Rate They Use for Section 251(b)(5) Traffic.**

If the Commission accepts XO's argument that it is entitled to the rate in the Focal Agreement for Section 251(b)(5) traffic, then it should direct the parties to use that rate for terminating ISP traffic. The use of the same rate for both types of traffic is consistent with the FCC Order. The FCC stated that its mirroring rule, by which ILECs opting into the interim compensation regime must do so for both ISP traffic and Section 251(b)(5) traffic, was designed to prevent ILECs from exercising their superior bargaining power "to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier." FCC Order, para. 89. The same rationale applies here. Ameritech is currently exchanging traffic with other CLECs at the Commission-approved TELRIC based rates. Ameritech should not be allowed to deny XO the right to exchange traffic at the Commission-approved TELRIC based rate based on Ameritech's view of what is in its own best financial interest.

Mr. Panfil agrees that the FCC Order requires the parties to exchange ISP traffic at the Section 251(b)(5) rate:

Under the FCC's Order, however, Ameritech Illinois is required to exchange ISP-bound traffic at the same rates as 251(b)(5) traffic until such time, if any, as Ameritech Illinois chooses to avail itself of the rate caps that the FCC's Order establishes for ISP-bound traffic. (FCC Order ¶ 78.) Consequently, whatever rates the Commission requires the parties to use for 251(b)(5) traffic will also potentially apply to ISP-bound traffic – not because this Commission will so require, but because the FCC has so ruled.

Ameritech Ex. 1, p. 15.

**B. Ameritech Has Not Indicated That It Will Adopt the FCC Rate Cap.**

Ameritech refuses to avail itself of the interim compensation regime set forth in the FCC ISP Order and will make no commitment whether or not it will ever accept that cap. Mr. Panfil states that the company can make that decision at any time during the next three years and will base its decision on what is in the best financial interests of Ameritech. T. 123.

The Commission Staff has recommended that the Commission direct Ameritech to decide now whether it will opt into the interim compensation regime. XO supports that recommendation because it would bring certainty to the marketplace and prevent Ameritech from exercising veto power over any Commission order regarding reciprocal compensation. In other words, by withholding its decision, Ameritech could nullify any effort of the Commission to address reciprocal compensation by simply opting into the interim compensation regime once the Commission issues an order the Company does not like.

**C. Ameritech's Bifurcated Proposal Is Contrary to the Law and Is Not Supported By the Evidence.**

Ameritech has proposed that its bifurcated rate proposal be applied to both Section 251(b)(5) and ISP traffic. Ameritech's request cannot be granted. As discussed above, XO has an absolute right under 252(i) to opt into the reciprocal compensation rate and structure contained in the Focal Agreement for Section 251(b)(5) traffic. Therefore, even if the Commission agreed with Ameritech that the bifurcated rate design is appropriate, it could not adopt it in this proceeding for XO's Section 251(b)(5) traffic.

Further, under the FCC Order, state commissions no longer have authority to address intercarrier compensation for ISP-bound traffic. FCC Order, para. 82.

Therefore, the bifurcated proposal could not be applied to ISP traffic.

For these reasons, if the Commission determines that it would like to explore Ameritech's bifurcated proposal for 251(b)(5) traffic it must do so outside the context of this case.

**1. Ameritech's Bifurcated Rate Proposal Is Based on Costs That Have Never Been Examined by This Commission.**

There has been no investigation into cost studies supporting Ameritech's proposal. XO did not know the rates that Ameritech was proposing in this case until Mr. Panfil filed his testimony. XO Ex. 2, p. 4. It was only then that XO was aware that Ameritech intended to base its rates on the underlying costs in its 1996 cost study that supports its current TELRIC rates. Mr. Panfil tries to argue that the company's proposal is based on a simple calculation of costs already found reasonable in the Commission investigation of the TELRIC rates. Yet when questioned on the nature of the underlying cost study, he agrees that it is complex and difficult to analyze. T. 99-104. Moreover, he agreed that: "As far as I know, there was no discussion or dispute over which costs were setup costs and the level of those costs and which costs were duration costs and the level of those costs." T. 104. Yet such an analysis is exactly the type of analysis that would be necessary in a case considering the costs underlying Ameritech's bifurcated rate proposal. Expressing such concerns, Staff witness Zolnierrek stated:

Ameritech is purporting to implement rates derived from its commission TELRIC costs in a manner that may not have been contemplated in past TELRIC proceedings. Clearly, the overriding purpose in such

proceedings is to derive costs used to compute cost based pricing. The fundamental concern for competitors, consumers and this Commission is the price derived from such exercises. The rates for reciprocal compensation have depended exclusively on the per-minute-of-use costs of providing traffic termination services. Therefore, it is not only conceivable, but also highly likely, that, given the virtually limitless number of steps making up Ameritech's cost studies, that very little scrutiny has been given to the separation of termination costs into setup and duration costs. Without such scrutiny, and given the dramatic effect such costs would have on bifurcated reciprocal compensation rates Staff cannot endorse their use for such purposes.

Staff Ex. 1, p. 30.

The evidence in this case simply does not support Ameritech's bifurcated rate proposal.

## **2. The Bifurcated Proposal Should Not Be Considered in This Docket.**

Ameritech devotes considerable testimony to the alleged economic distortions caused by its current reciprocal compensation scheme in which carriers that predominantly terminate ISP traffic have long hold times and thus over-recover fixed costs that are based on an assumption of hold times of approximately 3.5 minutes. Ameritech Ex. 1, p. 8. The FCC addressed exactly this issue in its ISP Order where it established an interim regime that ILECs may elect in order to ease any perceived market distortions.

At no time, however, does Ameritech allege that XO is contributing to the perceived market distortions. In fact, Mr. Panfil has no idea whether XO's hold time average is unusual and has no idea whether XO has targeted ISPs as customers. T. 123-24. Ameritech has singled XO out from the rest of the industry. Ameritech is asking this Commission to fix an alleged industry problem by implementing Ameritech's preferred

solution on XO alone, even though there is no evidence that XO is one of the offending carriers, and even though this “solution” to a perceived industry problem would not be imposed on the industry at large.

If Ameritech’s bifurcated rate proposal is investigated at all, it should be investigated in a generic proceeding where all carriers are afforded an opportunity to participate. This Commission was faced with a similar request from Ameritech in the Focal Arbitration proceeding. In that case, the Commission decided to open a generic docket:

Furthermore, since the issues raised here related to reciprocal compensation are likely to be very similar to those raised in other arbitration proceedings and other market participants have not been party to this proceeding, we conclude that this arbitration decision is not the proper place for the Commission to adopt a position which will have far-reaching competitive and economic effects upon the telecommunications marketplace.

*Focal Illinois*, ICC Docket No. 00-0027, p. 12.

The Commission should have similar concerns here. Approval of Ameritech’s bifurcated rate proposal would have far reaching competitive and economic effects upon the telecommunications marketplace. As noted by Dr. Zolnierrek, adoption of Ameritech’s bifurcated rate proposal would significantly increase the Ameritech’s net revenues at the expense of not only CLECs that have ISP customers, but also CMRS providers. Staff Ex. 1, pp. 27-29. The only appropriate forum to consider such a proposal, if at all, is in a generic proceeding. XO, however, has two concerns about such a proceeding.

First, the FCC identified the bifurcated rate proposal as a possible solution and declined to adopt it. (See footnote 142 of the FCC’s ISP Order, noting Sprint’s proposal

for a bifurcated rate.) The FCC perceives numerous problems with any compensation scheme in which the calling party's network pays ("CPNP") the receiving carrier: "Contrary to the view espoused by CLECs, we are concerned that the market distortions caused by applying a CPNP regime to ISP-bound traffic cannot be cured by regulators or carriers simply attempting to 'get the rate right.'" FCC Order, para. 76. Ameritech, through its bifurcated proposal, is attempting to do just that.

Because few of the problems identified by the FCC are solved by bifurcated rates, the FCC decided that a combination of low per minute rates with a cap on ISP traffic recovery would be the best interim solution and tentatively stated that bill-and-keep would be the best long-term solution. Ameritech's parent, SBC, apparently agrees. In comments filed with the FCC in CC Docket No. 01-92 on August 21, 2001, SBC stated that bill-and-keep should be imposed on all traffic at the conclusion of the three year interim rate period.<sup>2</sup> Thus, SBC has no intention of its bifurcated rate proposal lasting beyond the interim period. This Commission may not wish to expend its resources in an investigation into Ameritech's bifurcated rate proposal when it knows that those rates will likely be obsolete three years from now. Moreover, if Ameritech can decide to opt into the FCC's caps at any time during the three year period, as it asserts, the Commission may find that the bifurcated rates would be in place for even a shorter period of time.

Further complicating matters is the fact that this Commission does not have jurisdiction to consider Ameritech's new rate design for ISP traffic. As noted by Mr. Zolnierек, the FCC's Order removes the Commission's jurisdiction to set ISP rates. Staff

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<sup>2</sup> Concurrent with the filing of this brief, XO has filed a motion to take administrative notice of those comments.

Ex. 1, p. 25. In fact, this Commission dismissed its investigation into reciprocal compensation for ISP traffic in Docket 00-0555 for that very reason. Ameritech provides no rationale why a new investigation into rates designed to “fix” the problems caused by ISP traffic would have any different jurisdictional support.

Second, if the Commission decides to direct that a generic docket be opened, it should not as the Commission did in the Focal proceeding, order that rates set in this arbitration may be subject to refund at the conclusion of the generic docket. *Focal Illinois*, ICC Docket No. 00-0027, p. 12. As can be seen from the sequence of events after the Focal Arbitration, where the Commission opened a docket and then, months later had to dismiss it due to the FCC’s ISP Order, nothing comes off as planned. It would be grossly unfair to XO to subject its revenues to years of uncertainty. Mr. Kinkoph testified that the Commission should therefore not make the rates set in this proceeding subject to refund:

XO will make its business plans when the Commission enters a final order in this proceeding, which XO believes should include a directive to Ameritech to immediately either adopt the FCC price caps or expressly decline to do so. It would be very difficult to make meaningful business plans, however, if reciprocal compensation payments are subject to refund based on what the Commission may or may not do in an as yet unopened investigation into the bifurcated proposal of Ameritech. Making XO’s reciprocal compensation revenue subject to refund will perpetuate the very business uncertainties which the FCC sought to eliminate in its ISP Order.

XO Ex. 3, p. 6.

**V. XO IS WILLING TO MODIFY THE TERMS AND CONDITIONS IN THE FOCAL AGREEMENT TO ADDRESS AMERITECH'S CONCERNS REGARDING SPECIFICITY OF ISP COMPENSATION.**

XO proposed that the parties use language from the Focal Agreement, slightly modified to remove reference to the fact that the rate for ISP traffic was based on the Commission decision in the Focal Arbitration, Docket 00-0027. (See Appendix E to XO's Arbitration Petition for XO's proposed language and XO Ex. 3, p. 7 for a redline version of the original Focal language).

Ameritech has argued that the agreement must have more specificity in its treatment of ISP traffic. Ameritech Ex. 1, pp. 19-23; Ameritech Ex. 3, pp. 7-9. As indicated by Mr. Kinkoph, XO is willing to modify the agreement to clearly set forth the parties' intent to compensate each other for traffic that terminates with ISPs using local exchange calling, (T. 48, T. 73-4) or any other type of traffic used to reach ISPs, such as 800 or 1-plus dialing, T. 52-61, 75-78. Mr. Kinkoph also indicated that XO would be willing to accept language that sets forth the potential changes in compensation under the FCC Order. T. 81

XO agrees that the following language, based on Ameritech's Appendix Reciprocal Compensation, could be added to the language in the Focal Agreement, most logically after section 4.7.3 of the agreement. If inserted, the numbering of the new paragraphs would need to be modified to be consistent with the agreement. This language reflects XO's position that the rates for ISP traffic should be those used for Section 251(b)(5) traffic instead of Ameritech's bifurcated rates. XO also notes that while Mr. Panfil stated that the agreement should include terms and conditions related to the FCC optional rate caps, (Ameritech Ex. 3, p. 8.), Ameritech did not propose such

language. XO would solve that deficiency by adding the final sentence contained in Section 12.2 below. Deletions and additions by XO to the language contained in Ameritech's Appendix Reciprocal Compensation are indicated by redline and strikeout. The stricken language and other sections in Appendix Reciprocal Compensation not listed below are not acceptable to XO because they go beyond the limited goal of ensuring that the parties' intent to compensate each other for ISP traffic is set forth in the agreement.

5.5 All ISP- and Internet-bound traffic shall be subject to the same terms and conditions regarding switch recordings, Calling Party Number (CPN) signaling, and other usage detail as other Local Calls under this ~~Appendix Agreement~~. Minutes of use to ISPs may be shown separately on the monthly usage detail, invoices, payment summaries, or other documents exchanged between ILEC and CLEC in the monthly billing cycle.

5.6 All intercarrier compensation for ISP- and Internet-bound traffic for a given usage month shall be due and owing at the same time as reciprocal compensation payments for Local Calls under this ~~Appendix Agreement~~. All terms and conditions regarding disputed minutes of use, nonpayment, partial payment, late payment, interest on outstanding balances, or other billing and payment terms shall apply to ISP- and Internet-bound traffic the same as for Local Calls under this ~~Appendix Agreement~~.

5.7 The rates in Pricing Schedule – Illinois, ITEM II shall apply for the termination of Local and ISP-bound traffic between ILEC and CLEC. ~~The underlying Agreement contains other compensation rates, including for Transit Traffic.~~

## **6.0 NON-LOCAL CALL TERMINATION**

6.1 The Parties recognize and agree that ISP- and Internet-bound traffic could also be exchanged outside of the applicable local calling scope, ~~or routed in ways that could make the rates and rate structure in section 5.0 above not apply~~, including but not limited to ISP-bound calls that fit the Agreement's definitions of:

Transit Traffic  
Optional EAS Traffic  
IntraLATA Interexchange Traffic  
InterLATA Interexchange Traffic

800, 888, 877, ("8yy") Traffic  
Feature Group A Traffic  
Feature Group D Traffic

6.2 The Parties agree that ~~for the purpose of this Appendix~~, either Party's end users remain free to place ISP-bound calls on a "Non-Local" basis under any of the above classifications. Notwithstanding section 4.3.12, s~~Such "Non-Local" ISP-bound calls are not subject to section 5.0 above, but instead~~ are subject to the Agreement's rates, terms and conditions for IntraLATA and/or InterLATA calling, including but not limited to rating and routing according to the terminating party's Exchange Access intrastate and/or interstate tariffs.

6.3 Physical interconnection, routing, and trunking of ISP calls on an Inter-Exchange basis, either IntraLATA or InterLATA, shall be as specified in the Agreement for all other traffic exchanged.,~~including but not limited to, the need to route over Meet Point Billing trunks.~~

## **12.0 NON-WAIVER AND AMENDMENT TO THE ACT RIGHTS**

12.1 By executing this ~~Agreement~~Appendix and carrying out the intercarrier compensation rates, terms and conditions herein, neither Party waives any of its rights under the ISP Intercarrier Compensation Order. The parties expressly reserve all such rights, including but not limited to the right to seek judicial, legislative and/or FCC review.

12.2 The Parties acknowledge that some carriers have challenged the ISP Intercarrier Compensation Order in general and the transition plan therein in particular.- ~~If, as a result of a regulatory or judicial modification or reversal of said transition plan, ILEC must reimburse CLECs generally for the difference between the FCC transition plan rates and the applicable transport and termination rates that otherwise would have applied to ISP-bound traffic, ILEC shall be entitled to receive from CLEC any additional compensation ILEC would have received from CLEC had the transition plan not been applied to any traffic under this Appendix~~ The Parties also acknowledge that ILEC has not elected to be bound by the interim compensation regime set forth by the FCC in Order No. 01-131, April 27, 2001. In the event that ILEC validly elects to be bound by the interim compensation regime, the Parties agree that such an election is an Amendment to the Act under section XXVIII.2 of the Agreement.

12.3 The Parties further acknowledge that the FCC has issued a Notice of Proposed Rulemaking on the topic of Intercarrier Compensation generally. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92; established in Notice of Proposed Rulemaking Order No. 01-132, April 27, 2001. In the event that a final, legally binding FCC

Order is issued upon the conclusion of that NPRM proceeding and during the term of this Appendix, the Parties agree that such Order is an Amendment to the Act under section XXVIII.2 of the Agreement.

### **13.0 RESERVATION OF RIGHTS**

13.1 Both parties reserve all rights to seek state or federal commission and/or court intervention regarding the payment of reciprocal compensation for ISP- or Internet-bound traffic, including the right to seek refunds or reimbursements for such traffic exchanged prior to the ISP Inter-carrier Compensation Order, or to enforce prior agreements regarding inter-carrier compensation. Nothing herein shall constitute an admission by ILEC that ISP- or Internet-bound traffic is subject to reciprocal compensation under the Telecommunications Act of 1996.

## **VI. RESPONSES TO THE QUESTIONS OF THE ADMINISTRATIVE LAW JUDGE.**

During the hearing in this case, the Administrative Law Judge indicated that the parties should address several questions regarding the precise language of the FCC in paragraph 89 of its ISP Order. The first request was to identify the rates and contracts the parties believe are being addressed by the FCC. T. 220. The Administrative Law Judge also asked the parties to state whether the FCC was discussing preexisting contracts or the contract created in the arbitration and state whether the “rate” in that paragraph refers to the tariffed rate for reciprocal compensation. T. 222. Finally, the Administrative Law Judge asked if the use of the plural form of “contracts” was significant. T. 222.

XO believes that the “state-approved or state-arbitrated rates” referred to in para. 89 of the FCC Order are either generic rates for Section 251(b)(5) traffic applicable to all carriers, such as the Ameritech tariff for reciprocal compensation, or the specific rate in the contract at issue. The “contracts” referred to in paragraph 89 are the specific contract or contracts before the Commission in a particular case. In this case, that contract is the

Focal Agreement and the rate is the Focal rate. Because the Focal rate is equal to the tariff rate, however, either could apply here and the Commission need not decide if one should take precedence over the other.

The FCC has determined that states do not have jurisdiction to set rates for ISP traffic. Where an ILEC does not elect the FCC's interim compensation regime for ISP-bound traffic, the FCC has determined what rates should then apply for ISP-bound traffic. The "rates" which should then apply, as referenced in paragraph 89, are the rates for Section 251(b)(5) traffic. The last sentence of this paragraph reads as follows: "This 'mirroring' rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic." The result is that the rate set by the Commission for Section 251(b)(5) traffic becomes the rate for ISP traffic.

XO also notes that the question of whether "rates" refers to preexisting rates or rates that could be set in an arbitration is not relevant in this proceeding because XO has opted into the Focal rates for Section 251(b)(5) traffic. Thus, even though the FCC may have been referring to newly arbitrated rates, that cannot be done here because XO has an absolute right to the Focal rates for Section 251(b)(5) traffic. Pursuant to the "mirroring" rule, those rates then become the rates for ISP traffic.

The Administrative Law Judge also asked the parties to address the tension between Section 252(i) and Section 252(d) to the extent that Section 252(i) allows carriers to opt into existing agreements and Section 252(d) requires that rates be just and reasonable. XO believes that Section 252(i) and Section 252(d) compliment each other. Section 252(i) allows carriers to opt into existing approved interconnection agreements. The rates set in the Focal Agreement were determined by the Commission in Docket 00-

0027 pursuant to the requirements in the Federal Act. One of those requirements was that rates meet the Section 252(d) pricing standards. Focal met its burden of proving that its rates met that standard. The purpose of Section 252(i) is to enable CLECs to obtain the rates, terms and conditions from existing agreements and thus reduce transactional costs and eliminate the ability of ILECs to engage in discrimination. Forcing XO to prove once more that the Focal rates meet the Section 252(d) standards would be inconsistent with that purpose.

Finally, the Administrative Law Judge requested that XO address how the Focal Agreement handles the various reciprocal compensation elements and mechanisms contained in Ameritech's Appendix Reciprocal Compensation. T. 220-21. As indicated in Section V of this Brief, XO is willing to accept certain portions of the Appendix Reciprocal Compensation that address ISP traffic. XO does not accept Ameritech's bifurcated proposal. Therefore, while XO believes that the Appendix Reciprocal Compensation is unnecessary, XO is willing to accept certain portions of that Appendix, as modified, in order to stave off future disputes regarding ISP-bound traffic.

## **VII. CONCLUSION**

For the reasons stated above, the Commission should direct the parties to file an interconnection agreement for its approval that consists of the Focal Agreement, with any modifications and additional appendixes that the parties have already negotiated, along with the language changes suggested in Section V of this brief.

Dated: September 4, 2001

Respectfully submitted,  
XO ILLINOIS, INC.

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